

D.P.U. 92-130-A

Petition of Boston Edison Company to waive the requirements of 220 C.M.R. §§ 8.00 et seq. and defer any further activities regarding the Company's third request for proposals for the purchase of electricity from non-utility generators.

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I. INTRODUCTION

On June 25, 1993, the Department of Public Utilities ("Department") issued an Order denying the petition of Boston Edison Company ("BECo" or "Company") to waive the requirements of 220 C.M.R. §§ 8.00 et seq. and defer any further activities regarding the Company's third request for proposals for the purchase of electricity from non-utility generators ("RFP 3"). Boston Edison Company, D.P.U. 92-130 (1993). The Department directed the Company to resume activities in its RFP3 consistent with the requirements of 220 C.M.R. §§ 8.00 et seq. Id. at 29. Accordingly, consistent with the provisions of 220 C.M.R. § 8.05(6)(a), BECo must begin contract negotiations with the project sponsor whose proposal is in the Award Group for RFP 3.¹ Id. at 34. The Department required that BECo begin such contract negotiations within seven days of the issuance of the June 25, 1993 Order. Id. However, the Department stated that BECo was not required to file any contracts for the purchase of power under RFP 3 until after the Department issues orders regarding five pending petitions filed by RFP 3 project sponsors that seek to require BECo to re-qualify or rescore their proposals ("Bidders' Proceedings").² Id. at 33.

On June 30, 1993, BECo filed with the Department a Motion for Immediate Stay. By

¹ On June 2, 1992, BECo announced the rankings of the proposals submitted in RFP 3 and identified the Al tresco Lynn Project, which is sponsored by Al tresco Financial, Inc., as the sole member of the Award Group. D.P.U. 92-130, at 2-3.

² The Bidders' Proceedings under review by the Department are as follows: Concord Energy Corporation, D.P.U. 92-144; Williams/Newcorp Generating Company, D.P.U. 92-146; DLS Energy, Inc., D.P.U. 92-153; CMS Generation Company and Montvale Energy Associates, L.P., D.P.U. 92-166; and Bio Development Corporation, D.P.U. 92-167.

this motion, BECo asks that the Department issue a stay of the Company's obligation to commence contract negotiations with the RFP 3 Award Group (Motion for Immediate Stay, ¶18). BECo requests that the stay take effect immediately and remain in effect until the later of (1) the Department's final decision with respect to the Bidders' Proceedings, and the expiration of related appellate rights, or (2) the decision of the Supreme Judicial Court ("Court") regarding the Company's expected appeal of the Department's June 25, 1993 Order in this case (i.d.).³

On July 7, 1993, Altresco Financial, Inc. ("Altresco") filed an Opposition to BECo's Motion for Immediate Stay ("Altresco Opposition"). Altresco argues that BECo's Motion for Immediate Stay is entirely without merit and should be denied summarily by the Department (Altresco Opposition at 3). Also on July 7, 1993, CMS Generation Company and Montvale Energy Associates, L.P. ("CMS/Montvale") filed a "Reply to Boston Edison Company Motion for Immediate Stay and Request for Special Expedited Procedure to Resolve Protests" ("CMS/Montvale Reply"). CMS/Montvale supports BECo's Motion for Immediate Stay (CMS/Montvale Reply at 1-2).

³ As of the date of this Order, BECo has not filed any appeal of the Department's June 25, 1993 Order. However, in its motion, BECo states its intent to file a petition for appeal with the Supreme Judicial Court for Suffolk requesting that the Court set aside the Department's June 25, 1993 Order (Motion for Immediate Stay, ¶15). Any petition for appeal must be filed with the Department within 20 days of the date of the Order. G.L. c. 25, § 5. Within ten days of filing such petition, the appealing party must enter an appeal with the Supreme Judicial Court for Suffolk County. I.d.

II. POSITIONS OF THE PARTIES

A. The Company

BECo maintains that there are compelling reasons for the Department to suspend the portion of the June 25, 1993 Order requiring the Company to conduct contract negotiations with Al tresco (Motion for Immediate Stay, ¶ 6). BECo relies on the Department's previous Interim Order in Boston Edison Company, D.P.U. 92-130-2 (1992),⁴ whereby the Department issued a stay suspending BECo's obligations to negotiate and execute a contract with the RFP 3 Award Group until the Department decided BECo's petition to terminate RFP 3 (i.d., citing D.P.U. 92-130-2, at 10-12). BECo contends that it would be inappropriate for the Company to enter into binding legal obligations with Al tresco prior to the conclusion of the Company's intended appeal, or prior to the Department's determination of the RFP 3 winner (through a resolution of the Bidders' Proceedings), and the expiration of the appellate rights of the five contesting bidders (i.d., ¶ 7). BECo argues that a stay is needed (1) whether the Department's June 25, 1993 Order imposed a current obligation on BECo to execute a contract with Al tresco, or (2) whether the Department's June 25, 1993 Order imposed only a current obligation on BECo to negotiate a contract with Al tresco, with execution of a contract suspended until the Department issues final orders in the Bidders'

⁴ On August 4, 1992, the Department issued an Interim Order in this case issuing a stay of BECo's obligation to "immediately begin the process of negotiating power purchase contracts with the award group members for its" RFP 3 until seven days after the Department issues a final decision on the Company's underlying petition to terminate its RFP 3. D.P.U. 92-130-2, at 12-13.

Proceedings (*i.d.*).⁵

B. Altresco

Altresco maintains that BECo has tied its request for a stay to two events: (1) the resolution of the Bidders' Proceedings, and (2) the resolution of a future appeal by the Company of the Department's June 25, 1993 decision in D.P.U. 92-130 (Altresco Opposition at 2). Altresco contends that, in effect, BECo is advancing two separate claims for relief (*i.d.*). Altresco asserts that the only new factor advanced by BECo to support both requests for relief is the Company's stated intention to appeal the Department's June 25, 1993 Order (*i.d.*).

Altresco argues that there are three distinct factors that weigh against granting a stay based on the resolution of the Bidders' Proceedings: (1) the Department explicitly ruled in D.P.U. 92-130 that BECo is not obligated to execute a contract with Altresco until after the Department issues orders in the Bidders' Proceedings; (2) BECo's request for a stay is tantamount to a request for reconsideration, and BECo has not met the burden of proof that is required for the Department to reconsider a decision that it already has rendered; and (3) even if the Department were to consider de novo BECo's Motion for Immediate Stay, the balancing of the relevant interests weighs against granting a stay (*i.d.* at 2-3).

⁵ In the Department's June 25, 1993 Order, we stated that "the Department does not expect BECo to file any contracts for the purchase of power under RFP3 until after the Department issues orders in these [Bidders' Proceedings]." D.P.U. 92-130, at 33-34. BECo contends that, based on this language, it is unclear whether the Company is obligated not only to conduct contract negotiations with Altresco but also actually to execute a contract with Altresco (Motion for Immediate Stay, ¶¶ 3, 4). See Section III, below, for a clarification of this language from the June 25, 1993 Order.

Altresco also argues that BECo's request for a stay pending the resolution of its future appeal is extraordinary and unprecedented (i.d. at 11). Altresco asserts that BECo has cited to no Department procedural rules, applicable statutes, or case law to support such claim for relief (i.d.).

C. CMS/Montvale

CMS/Montvale supports BECo's Motion for Immediate Stay, arguing that such a stay is vital to preserving the rights of CMS/Montvale (and the rights of other project sponsors who have challenged the results of BECo's ranking in RFP 3) to obtain a fair and timely resolution of its complaint in D.P.U. 92-166 (CMS/Montvale Reply at 2). CMS/Montvale contends that, without the stay, BECo and Altresco will incur expenses that may prove unnecessary (i.d. at 6). CMS/Montvale also asserts that requiring contract negotiations between BECo and Altresco will suggest that the Department has prejudiced the merits of the Bidders' Proceedings (i.d.).

CMS/Montvale also raises several issues and arguments related to its complaint in D.P.U. 92-166.

III. ANALYSIS AND FINDINGS

Once an award group has been identified in an RFP solicitation process approved by the Department, a utility has the following obligations: (1) to immediately begin "finalizing" power purchase contracts with the award group (220 C.M.R. § 8.05(6)(a)); and (2) to file the resulting contracts with the Department for approval (220 C.M.R. § 8.03(2)(a)). "Finalization" of a power purchase would require (1) contract negotiation, and (2) contract execution. Boston Edison Company, D.P.U. 92-130-2, at 10 (1992). Based on the

Department's June 25, 1993 Order in this case, BECo has a current obligation to negotiate a power purchase contract with the RFP 3 Award Group as presently constituted. Boston Edison Company, D.P.U. 90-130, at 34 (1993). BECo's further obligations under RFP 3 (executing a power purchase contract and filing the contract with the Department) have been suspended until the Department issues orders in the Bidders' Proceedings. Id. at 33-34.⁶

In its Motion for Immediate Stay, BECo has presented two components to its request to suspend its obligation to negotiate and execute a power purchase contract with the RFP 3 Award group. First, BECo requests that its stay be extended until the resolution of the Bidders' Proceedings. Second, BECo requests that its stay be extended until the resolution of its expected, future appeal of the Department's June 25, 1993 Order in D.P.U. 92-130.

The Department already has articulated clearly BECo's obligations under RFP 3 and how those obligations are affected by the Bidders' Proceedings. In its Motion for Immediate Stay, BECo has presented no information concerning the effect of the Bidders' Proceedings on BECo's obligations under RFP 3 that would require the Department to modify our decision in this regard. Therefore, the Department denies that portion of the Company's Motion for Immediate Stay that requests a suspension of BECo's obligation to negotiate a

⁶ In the June 25, 1993 Order, the Department stated "[s]ince the resolution of these petitions [the Bidders' Proceedings] may affect the determination of the RFP 3 Award Group, the Department does not expect BECo to file any contract for the purchase of power under RFP 3 until after the Department issues orders in those other proceedings." D.P.U. 90-130, at 33-34 (1993). As stated above, this provision suspends until after the Department issues orders in the Bidders' Proceedings BECo's obligations (1) under 220 C.M.R. § 8.05(6)(a) to execute a power purchase contract with the RFP 3 Award Group, and (2) under 220 C.M.R. § 8.03(2)(a) to file with the Department for approval any power purchase contract with the RFP 3 Award Group.

power purchase contract with the RFP Award Group until after the Department issues final orders in the Bidders' Proceedings and after the expiration of related appellate rights.

Regarding BECo's request for a stay extending until the resolution of a future appeal of the Department's June 25, 1993 Order, such a request is rare and we are not aware that the Department ever has granted such relief. In fact, the courts have found that "[a] strong presumption of regularity supports any order of an administrative agency; a stay pending judicial review is a rare event and depends on a demonstration that the administrative process has miscarried." Busboom Grain Co., Inc. v Interstate Commerce Commission, 830 F.2d 74, 75 (7th Cir. 1987).

The Department's authority for considering such a request is presented in the Administrative Procedures Act. See G.L. c. 30A, § 14(3).⁷ The factors that the Department will consider in determining whether such a stay is warranted are: (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be harmed irreparably absent a stay; (3) the prospect that others will be harmed if the Department grants the stay; and (4) the public interest in granting the stay. See, e.g., Cuomo v. United States Nuclear Regulatory Commission, 772 F.2d 972, 974 (C.A.D.C. 1985). On a motion for stay, it is the moving party's obligation to justify the Department's exercise of such an extraordinary remedy. Id. at 978.

Regarding the likelihood of BECo's success on the merits of its appeal, we cannot

⁷ "The commencement of an action shall not operate as a stay of enforcement of the agency decision, but the agency may stay enforcement, and the reviewing court may order a stay upon such terms as it considers proper." G.L. c. 30A, § 14(3).

determine whether BECo has made out a substantial case on the merits since no appeal has been filed. However, in our June 25, 1993 Order denying BECo's petition, the Department fully considered all of the Company's arguments and we found that compliance with our regulations at 220 C.M.R. §§ 8.00 et seq. is required and that BECo's RFP 3 should go forward. Therefore, we conclude that there is not a substantial likelihood that BECo will prevail on the merits of its expected appeal of the Department's June 25, 1993 Order.

Regarding the harm to BECo if the stay is not granted, we do recognize that, absent a stay, BECo may expend some unnecessary money, time, and energy in complying with the Department's June 25, 1993 Order if that Order subsequently is overturned. However, we do not find that such possible inconveniences constitute irreparable harm in this case. See, e.g., Waterbury Hospital v. Commission on Hospitals and Health Care, 316 A.2d 787, 789 (Conn. C.P. 1974) ("mere injuries in terms of money, time and energy necessarily expended in absence of a stay do not form a basis for a conclusion of irreparable injury").

Also, BECo has failed to demonstrate the probability that absence of the requested stay will be harmful to other parties.

Finally, by denying BECo's petition to terminate its RFP 3, the Department, in our June 25, 1993 Order, already determined that it is in the public interest for RFP 3 to continue. In its Motion for Immediate Stay, BECo has presented no information that would require us to change our conclusion. Also, in this instance, we do not find that this case presents such complex legal issues to require the Department to stay our final Order pending appellate review. Therefore, we find that the public interest does not require granting BECo's requested stay.

Accordingly, we find that BECo has failed to establish that it has a substantial case on the merits, and has further failed to demonstrate that the balance of equities or the public interest strongly favors the granting of its requested stay. Therefore, BECo's Motion for Immediate Stay is denied.

In regard to issues raised by CMS/Montvale that pertain to its complaint in D.P.U. 92-166, it is improper for CMS/Montvale to raise these issues in this proceeding. The parties to this case were given the opportunity to file comments on BECo's request for a stay. CMS/Montvale has taken unfair advantage of this opportunity to present arguments regarding its own complaint. This proceeding is not the proper forum for such arguments; and such arguments are not timely made in D.P.U. 92-166, since the time for filing pleadings in that case has passed. Including such matters in the record in this case would cause substantial prejudice to the other parties in D.P.U. 92-166. Therefore, we do not consider those issues and arguments in making our decision on BECo's requested stay.

I V. ORDER

Accordingly, after due consideration, it is

ORDERED: That the Motion for Immediate Stay filed by Boston Edison Company on June 30, 1993 be and is hereby DENIED; and it is

FURTHER ORDERED: That Boston Edison Company immediately shall comply with the requirements of the Department's June 25, 1993 Order in this case, as clarified herein.

By Order of the Department,

Commissioner Webster dissents from this Order.